MAGNEL E. DRABEK

IBLA 76-6 Decided June 27, 1979

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-7598.

Affirmed.

1. Alaska: Grazing -- Alaska: Native Allotments -- Indian Allotments on Public Domain: Lands Subject to

Native use and occupancy commenced at a time when land is otherwise appropriated and segregated from such use and occupancy provides no basis for a claim under the Act of May 17, 1906. Inclusion of the subject lands in 1932 in a grazing lease, withdrawal of the lands in 1940, selection of the lands in 1967 by the State of Alaska, and subsequent withdrawals in 1973 pursuant to the Alaska Native Claims Settlement Act have effectively kept the lands closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1932 to Dec. 18, 1971, when the Act was repealed by sec. 18 of the Alaska Native Claims Settlement Act.

Although the Department has adhered to the principle of protecting Indian occupancy on public lands, it also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaska Grazing Act of Mar. 4, 1927, as amended, 43 U.S.C. § 316, 316(a)-316(o) (1976).

APPEARANCES: Matthew D. Jamin, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On April 13, 1972, the Bureau of Indian Affairs filed a Native allotment application and Evidence of Occupancy for Magnel E. Drabek. 1/ The lands described in this application are located within protracted sec. 36, T. 29 S., R. 21 W., Seward meridian. Uses of the land asserted by appellant were seasonal hunting and trapping during the winter, berrypicking during the summer and fall, since 1943. Claimed improvements consisted only of a "tent frame, using rocks," valued at $50.

Appellant's application for a Native allotment was made under the Act of May 17, 1906, 34 Stat. 197, authorizing the Secretary in his discretion "to allot not to exceed one hundred sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a Native of said district, and who is the head of a family, or is twenty-one years of age." Regulations implementing the Act restrict such allotments to "vacant, unappropriated, and unreserved nonmineral land in Alaska." 43 CFR 2561.0-3 (1978).

On December 22, 1932, the lands sought by appellant were leased to Thomas J. Felton by grazing lease A-07916. This lease has been renewed and is in effect until December 31, 1997.

Lands described in appellant's Native allotment application were withdrawn from "settlement, location, sale, or entry for classification and in aid of legislation" on February 10, 1940, by Exec. Order No. 8344, signed by President Franklin D. Roosevelt.

Appellant claims to have begun her use and occupancy of the subject lands in July 1943.

Thereafter on June 26, 1961, PLO No. 2417 revoked Exec. Order No. 8344 and specified:

> Of the areas released from withdrawal * * * considerable areas are under grazing lease as authorized by the act of March 4, 1927 (44 Stat. 1452; 48 U.S.C. 471, 471a-471o). Lands included in such leases are considered to be appropriated and segregated and unavailable for entry under the * * * public laws relating to vacant, unappropriated

1/ Categorically, the Regional Director, Bureau of Indian Affairs, had advised this Board that every application for a Native allotment submitted by his office to BLM had been filed with his office, for certification, prior to the enactment of the Alaska Native Claims Settlement Act, December 18, 1971.

> lands, unless and until they have been determined to be suitable for such purpose and appropriate action has been taken to cancel the lease to the extent necessary and to classify the lands for other use or disposal.

On April 11, 1967, the State of Alaska amended its State selection application AA-651 to include all available lands in T. 29 S., R. 21 W., Seward meridian.

The subject lands were again withdrawn from all forms of appropriation under the public land laws, including selection by the State of Alaska, by PLO No. 5353 on July 17, 1973, and further withdrawn on August 27, 1973, pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976).

Against this background, the Alaska State Office, BLM, rejected appellant's application for Native allotment on May 13, 1975.

Appellant poses a number of issues in her statement of reasons on appeal:

1. The grazing lease issued to Thomas J. Felton on December 22, 1932, should have been "delimited" by BLM to exclude appellant's land. This result is compelled by 43 CFR 4131.3-1 (1977) and by the Department's fiduciary duty towards Native Americans. In the alternative, the Department should be estopped from asserting the existence of a grazing lease to bar establishment of appellant's alleged preference right.

2. The Alaska State selection in 1967 is invalid, because the land so selected was not vacant.

3. Withdrawals pursuant to the Alaska Native Claims Settlement Act are invalid, because each was made after establishment of appellant's preference right.

Appellant alleges to have begun her use of the subject lands in July 1943, 3 years after Exec. Order No. 8344 withdrew the lands from settlement, location, sale, or entry. When PLO No. 2417 revoked Exec. Order No. 8344 on June 26, 1961, the lands were nevertheless still subject to the Felton grazing lease which had been in effect since 1932.

In discussing the effect of such a grazing lease issued under the Act of March 4, 1927, the Associate Solicitor for Public Lands stated:

> It is clear that under the Act, the potential grazing use of public land in Alaska was made subordinate to its use for other more beneficial purpose and to development of its resources. But once a grazing lease had

> issued, it was the Act's purpose to protect the stockman in his use of the land to the extent indicated by the regulations and by the terms of the lease. To provide such protection, and particularly in view of the provisions of Sections 4 and 11 of the Act, the issuance of a grazing lease, except as to mining location, must be considered as an appropriation, segregating the leased lands from the remainder of the public domain so as to prevent unfettered entry thereon, at least until adverse action excluding the land from the lease had been taken. [Emphasis supplied.]

M-36453 (July 23, 1957), quoted in Harold J. Naughton, 3 IBLA 237, 242 (1971).

Appellant's settlement upon a tract of land withdrawn from entry is a trespass. Donald E. Miller, 2 IBLA 309, 314 (1971). Native use and occupancy commenced at a time when the land is otherwise appropriated and segregated from such use and occupancy provides no basis for a claim under the Act of May 17, 1906. Herman Haakanson, 23 IBLA 54, 57 (1975).

Neither 43 CFR 4230.1 2/ nor the Department's fiduciary duty to Native Americans compels BLM to recognize an occupancy which amounts to no more than a trespass. This Board was confronted with similar facts in Herman Haakanson, supra, wherein we quoted from Helena M. Schwiete, 14 IBLA 305 (1974), at 308:

> Appellant asserts that the Department steadfastly has adhered to the principle or protecting Indian

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2/ 43 CFR 4230.1. 43 FR 29062, July 5, 1978, is a recodification of 43 CFR 4131.3-1 (1977) and provides:

"Lands leased under the act are not subject to settlement, location, and acquisition under the nonmineral public land laws applicable to Alaska unless and until the authorized officer of the Bureau of Land Management determines that the grazing lease should be cancelled or reduced in order to permit, in the public interest and without undue interference with the grazing operations, the appropriate development and utilization of the lands (see § 4220.7(e)) and that the lands are suitable for and otherwise subject to the intended settlement, location, entry or acquisition. An application on the appropriate form or a notice on a form approved by the Director if applicable to the class of entry contemplated, will be accepted and treated as a petition for determination. Upon such determination and after not less than 30 days' notice thereof to the lessee the grazing lease may be cancelled or reduced to permit the settlement, location, entry or other acquisition of the lands so eliminated from the lease, and the petitioner will be accorded a preference right to settle upon or enter the lands in accordance with the determination."

> occupancy on public lands, citing, inter alia, Cramer v. United States, 261 U.S. 219, 227-29 (1923) and Solicitor's Opinion, 56 I.D. 397-98 (1938). We agree. The Department also has the responsibility of protecting rights of others to public land tenure, including persons who have been granted grazing leases under the Alaskan Grazing Act of March 4, 1927, as amended, 43 U.S.C. § 316, 316a-o (1970).

Appellant's second and third arguments on appeal challenge the validity of the Alaska State selection in 1967 and the withdrawals pursuant to the Alaska Native Claims Settlement Act in 1973 to deprive her of an interest in the subject lands. These arguments are answered by our discussion above. Appellant gained no rights to the land during the life of the grazing lease and Exec. Order No. 8344. Grazing lease A-07916 has been renewed and is in effect until December 31, 1997.

Inclusion of the subject lands in Felton's grazing lease in 1932, withdrawal of the lands in 1940, selection of the lands in 1967 by the State of Alaska, and subsequent withdrawals in 1973 pursuant to the Alaska Native Claims Settlement Act have effectively kept the lands closed to the initiation of rights under the Act of May 17, 1906, at all times during the period from 1932 to December 18, 1971, when the Act was repealed by section 18 of the Alaska Native Claims Settlement Act.

The alleged use and occupancy by appellant was initiated long after the grazing lease had segregated the land from entry. It would not be an appropriate exercise of discretion at this time to cancel the grazing lease and allow the allotment (if such could legally be done) where such meager use of land has been alleged, and there are other existing withdrawals which preclude the allotment.

Accordingly, we find that appellant's application was properly rejected. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Joan B. Thompson
Administrative Judge